



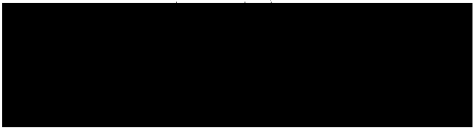
U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: LIN 01 183 50894

Office: NEBRASKA SERVICE CENTER

Date: FEB 27 2003

IN RE: Petitioner:
Beneficiary



Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. §1101(a)(15)(L)

IN BEHALF OF PETITIONER:



PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. §103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. §103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a gas station and convenience store. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its chief executive officer. The director determined that the petitioner had not established that the beneficiary had been or would be employed in a primarily managerial or executive capacity.

On appeal, counsel asserts that the director's denial is erroneous and submits a supporting brief.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

8 C.F.R. 214.2(1)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (1)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

8 C.F.R. 214.2(1)(14)(ii) states that a visa petition under section 101(a)(15)(L) which involved the opening of a new office may be extended by filing a new Form I-129, accompanied by the following:

(A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (1)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (1)(1)(ii)(H) of this section for the previous year;

(C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;

(D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and

(E) Evidence of the financial status of the United States operation.

The U.S. petitioner states that it was established in 2000 and that it is a wholly-owned subsidiary of New Elite Corp., which the petitioner described as a sole proprietorship, located in New Delhi, India. The petitioner declares five employees and \$1.8 million in expected gross revenues. The petitioner seeks to extend the petition's validity and the beneficiary's stay for three years at an annual salary of \$60,000.

At issue in this proceeding is whether the petitioner has established that the beneficiary will be employed primarily in a managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

Managerial capacity means an assignment within an organization in which the employee primarily-

i. manages the organization, or a department, subdivision, function, or component of the organization;

ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

iv. exercises discretion over the day-to-day operations of the activity or function for

which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. 1101(a)(44)(B), provides:

Executive capacity means an assignment within an organization in which the employee primarily-

i. directs the management of the organization or a major component or function of the organization;

ii. establishes the goals and policies of the organization, component or function;

iii. exercises wide latitude in discretionary decision-making; and

iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In support of the petition, counsel submitted the following statements regarding the beneficiary's job duties in the United States:

- To control the everyday operations of the Mobile Mart;
- To integrate all business functions of Elite Traders Ltd., and
- To be the principal contact with the parent company in India.

In particular [REDACTED] is:

Responsible for the overall direction of the company, the hiring and firing of personnel, the marketing and distribution efforts. He will initially approve all purchase agreements for the company, make all major financial decisions for the company, negotiate all legal matters for the company, make all major financial decisions for the company, negotiate all legal matters for the company, establish long and short term goals for the corporation, establish policy for the company and set standards of quality control.

The petitioner also submitted a purchase agreement, dated November 17, 2000, indicating that it had purchased a Mobil gas station.

On May 25, 2001, the Service sent the petitioner a notice requesting that additional evidence be submitted. The petitioner was instructed, in part, to name specific job duties being performed by the beneficiary in his capacity as manager or executive. The petitioner was also asked to submit a number of its tax documents reflecting business conducted in the United States in the years 2000 and 2001.

In response to the above, counsel submitted a statement explaining that the beneficiary is "the principal of the company" which now consists of a gas station and convenience store. Counsel explained that the business which the petitioner originally started was abandoned because it was not developing quickly leading the petitioner in the direction of an already existing business. The following statement was used to describe the beneficiary's duties in the United States:

██████████ has signed all important agreements on behalf of the company, including the purchase contracts for the company H.C.L. inc [sic], the registration of the underground storage tank, the supply agreement for the gas, and the request to the Michigan department to transfer the liquor license.

The petitioner also submitted the names of its employees, as well as their W-2 wage and tax statements for the year 2000.

The director denied the petition, noting that based on the salaries of the petitioner's respective employees, only one of the W-2 wage and tax statements was commensurate with that of a full-time employee. The three remaining employees made between \$1,600 and \$5,200 during the year 2000. As properly noted by the director, such salaries are not commensurate with a 40-hour work week. Based on the long hours of operation, the director concluded that the petitioner could not function with only one full-time employee and three part-time employees, unless the beneficiary were directly involved in performing nonqualifying duties.

Counsel asserts on appeal that the director's conclusions are arbitrary and capricious. Counsel claims that the director's conclusions regarding the number of full-time and part-time employees are unfounded, arguing the salaries of several of the employees are low because they commenced their employment mid-year. However, counsel has provided no documentation to substantiate such claim. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

Further, counsel states that the director is incorrect in concluding that the petitioning organization does not need a manager. However, counsel has clearly failed to draw a distinction between the plain definition of "manager," as understood in the ordinary course of the average business, and the regulatory definition of "managerial capacity" as described in 8 C.F.R. 214.2(l)(1)(ii)(B). The latter restricts the beneficiary's duties and prevents the beneficiary from being able to actually perform the services of the company that employs him. In light of that restriction, it is reasonable to conclude that the beneficiary would not be relieved of having to perform nonqualifying duties, regardless of his clearly significant role as the head of the petitioner's organizational hierarchy. While counsel makes references to the remaining W-2 forms, indicating that the company employed 9 employees throughout the year 2000, the fact remains that the petitioner submitted a list (in response to the Service's request for additional evidence) naming the four employees it currently employs.

Finally, counsel reiterates the beneficiary's role in commencing operation of its newly acquired gas station and convenience store. However, once again counsel has dismissed the fact that the duties listed only account for the tasks initially performed by the beneficiary prior to the commencement of business operations. While the tasks described clearly indicate that the beneficiary has great control over the direction of the business, counsel has failed to provide a description of the duties the beneficiary would be performing after the business moves beyond the initial stages of development. Thus, there is no clear understanding of what the beneficiary will be doing on a daily basis.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner did not provide a comprehensive description of the beneficiary's routine duties. Contrary to counsel's apparent misinterpretation, the fact that the beneficiary has great control over the business does not indicate that he will be primarily employed in a managerial or executive capacity.

The fact that an individual manages a small business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. The record does not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the organization. The record indicates that a preponderance of the beneficiary's duties have been and will be directly providing the services of the business. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing nonqualifying duties. The petitioner has not

demonstrated that it has reached or will reach a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. Nor does the record demonstrate that the beneficiary primarily manages an essential function of the organization. Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has submitted two stock certificates which indicate that the beneficiary personally owns 80 shares of the petitioner's stock. This evidence contradicts the petitioner's claim in the petition that the U.S. enterprise is a wholly-owned subsidiary of an Indian-based company. 8 C.F.R. 214.2(1)(1)(ii)(K) provides the following definition:

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

According to the above definition, the petitioner does not have a parent/subsidiary relationship with a company abroad. In fact, there is no evidence that a qualifying relationship exists at all between the petitioner and a foreign company. However, as the appeal will be dismissed on the grounds discussed, these issues need not be addressed further.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.